IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION 500 OF 2004

Anker Coal Company B.V. ... Petitioner..

vs.

Ultratech Cemco Ltd. (earlier known as Larsen & Toubro Ltd.) .... Respondent.

Mr.Rohit Kapadia with D.C.Singhania, D.P.Sharma, Sanjay Krishan, Ms.Harshada Rane i/b. Singhania Legal Services, for Petitioner.

Mr.Janak Dwarkadas, Pradip Sancheti, B.B.Saraf, Sachin Chandarana and Ms.Rajashree Rastogi i/b. M/s.M.K.Ambalal & Co. for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 19th January, 2006

P.C.:-

1. By this petition, the petitioner challenges the Award made by the learned Sole Arbtirator dated 6th July,.2004 directing the petitioner to pay by way of damages an amount of $ 1,730,599 with interest & cost of Rs.13,27,655/. The facts that are material and relevant for deciding this petition are that the respondent entered into an agreement dated 18.9.1995 and thereby agreed to purchase and the petitioner agreed to supply steaming coal from the respondent's South African Mines

upon the terms and conditions set out in the Agreement. The agreement includes the arbitration clause. As dispute arose between the parties, they were referred to the learned Sole Arbitrator for decision. During the course of arbitration proceedings apart from the documentary evidence, oral evidence was also led by the parties. Mr.D.S.Patwardhan was examined as a witness on behalf of the respondent whereas Mr.H.F.Ates and Mr.Sabby Jeet Singh were examined as witness by the petitioner. The learned Arbitrator has made the Award holding that the petitioner committed breach of the contract of supplying cargo which are styled as "cargo bb" and "cargo cc" in the contract and therefore, under the risk purchase clause in the contract the petitioner is liable to pay damages to the respondent. The clause 4 of the contract between the parties is relevant which speaks about the cargoes to be supplied, the loading dates and the discharge ports. The clause 4 reads as under:-

> “4. Quantity:
>
> a) No. of Cargoes/Disport details:-

“Firm Cargo No.	Loading of Loadport	Discharge Ports
aa)	December,1999	L&T Jetty,Pipavav.
bb)	February,1999	Chennai
cc)	To be indicated at a Late Date.	

> The buyer shall have the exclusive right to take cargo cc) either for the Buyer's Gujarat Cement Works (GCW) at L&T Jetty/GPPL

> Jetty-Pipavav Port or for the Buyer's Andhra Pradesh Cement Works (APCW) at Chennai Port. Buyer shall communicate to the Seller most likely shipment schedule for cargo cc) by December 31, 1999 and shall intimate his confirmation in writing on or before 15th February,2000 and this cargo will be taken for shipment latest by August,2000.
> b) Cargosize For GCW: Handimax loaded vessels will arrive directly to L&T Jetty-Pipavav with vessel arrival draught of 10.5 mtrs.. Cargo size may be in the range of 36000 – 38000 MT depending upon the vessel specifications.
>
> Alternatively,
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> In case Buyer is able to relax the restriction on arrival draught, after carrying out some dredging work, after January 01, 2000, Buyer may be in a position to accept loaded handimax vessels with an arrival draught of 11.0 mtrs. Cargo size may be in the range of 39000 – 41000 MT, depending upon the vessel specifications.
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> FOR APCW: Handimax loaded vessels will arrive at Chennai Port with arrival draught of 33 ft. max. Cargo size will be in the range of 34000 – 37000 MT.
>
> All the above cargoes shall be exclusive cargoes meant to be supplied to M/s.Larsen & Toubro Limited (L&T)."

Out of the three cargoes mentioned in the contract, it is not disputed that the "Cargo aa" was duly supplied by the petitioner to the respondent and there was no dispute between the parties in relation to "Cargo aa". The dispute between the parties relates to "Cargo bb" and "Cargo cc". Before the learned Arbitrator, the respondent claimed damages for breach of the contract committed by the petitioner for failure of the petitioner to deliver two cargoes which the petitioner had, by the contract, agreed to sell to the respondent viz. Cargo bb and Cargo cc. The respondent claimed that due to the aforesaid breach of

contract the respondent had no option but to purchase the cargo from third party which they have agreed to purchase from the petitioner and which the petitioner failed to deliver. Before the Arbitrator it was contended by the respondent that by the contract the respondent had agreed to purchase three lots of Cargoes of coal from the petitioner totalling 111,000 metric tons of coal. The contract was for a price per metric ton C and F and delivery was to be on free out basis at the port of discharge. The first lot namely "cargo aa" 36,619 metric tons was delivered and for which the respondent paid the price to the petitioner. By clause 4 of the Contract, the time for loading of "cargo bb" was to be February,2000. In accordance with the said clause no.4, the Respondent by letter dated 3.12.1999 notified the agent of the petitioner that the shipment schedule for the cargo was to be between 20th February, 2000 and 29th February,2000. Similarly, by clause 4 of the Contract the time for loading of "cargo cc" was to be indicated at a later date. In accordance with the said clause 4 therefore, the respondent by the same letter dated 3rd December,1999 notified the agent of the petitioner that shipment of this cargo was to be between 20th April,2000 and 30th April , 2000. According to the respondent, the petitioner failed to nominate a vessel for the shipment of the "cargo bb". Instead by their letter dated 31.1.2000 the petitioner notified that an event of Force Majeure had occurred. So far as "cargo cc" is concerned, the petitioner by letter dated 23.12.1999 intimated to the

respondent that they will be able to load “cargo cc” after May,2000. The respondent did not intimate the shipment schedule for loading of the “cargo cc” in the month of February,2000 because according to the respondent the event of Force Majeure had declared in the month of February, 2000. The petitioner by letter dated 31.1.2000 informed the respondent that the port where the cargoes were to be loaded had declared an event of Force Majeure. In response to the aforesaid notice of Force Majeure, the respondent by its letter dated 2.2.2000 required the petitioner to keep them informed of the termination of the Force Majeure event. Thereafter the correspondence was exchanged between the parties in relation to “cargo bb” and “cargo cc” but it appears that the petitioner did not supply the “cargo bb” and “cargo cc”. The claim of the respondent was that by failure to supply “cargo bb” and “cargo cc”, the petitioner committed breach of the contract and therefore, the respondent was entitled to make purchase under risk purchase clause in the Contract which the respondent had done. The respondent had to make purchase at higher price and therefore, according to the respondent, they were entitled to difference in the agreed price and the price that was required to pay for purchase of cargo from a third party. The case of the petitioner before the learned Arbitrator in so far as “cargo bb” is concerned was that as per the terms of the contract that cargo was to be loaded in the month of February,2000. It is submitted that in the mercantile contract time is

the essence of the contract and therefore, on taking place of Force Majeure events the loading of cargo in the money of February,2000 became impossible which resulted in frustration of the contract and therefore, in so far as cargo bb is concerned, the petitioner cannot be held liable. So far as "cargo cc" is concerned, it was the case of the petitioner that the schedule of that cargo as per the contract were to be confirmed by the respondent by the month of February,2000. The respondent did not confirm the schedule for loading of the "Cargo cc" during the month of February, 2000 and therefore, the breach of the contract in so far as "cargo cc" is concerned has been committed by the respondent and not by the petitioner.

2. The learned Arbitrator in the Award has held that on proper reading of clause 20 of the Contract which contain recitals about Force Majeure events, it cannot be said that happening of Force Majeure event results in frustration of the contract. According to the learned Arbitrator, if force majeure event occurs as per clause 20 it results in suspension of the contract and therefore, the petitioner was obliged to make supply of "Cargo bb" after effect of force majeure event was over. The learned Arbitrator has held that the petitioner was also obliged to supply "cargo cc". The learned Arbitrator has therefore, held that there is no question of respondent confirming the schedule for the shipment of "cargo cc" in the month of February,2000 because

of the existence of force majeure event and therefore, the petitioner cannot wriggle out of the obligation to deliver “cargo cc” by relying on the terms of the contract regarding confirmation of shipment in the month of February,2000. The learned Arbitrator has held that the respondent is also entitled to the damages under the risk purchase clause. The learned Arbitrator has held that the average price of the purchase of coal from alternative sources by the respondent is to be taken and accordingly, the learned Arbitrator has made the Award.

3. The learned Counsel appearing for the petitioner so far as “cargo bb” is concerned submits that since the force majeure event occurred it was impossible for the petitioner to load “cargo bb” in the month of February,2000. According to the learned Counsel in view of the judgment of the Supreme Court in the Case of “China Cotton Exporters vs. M/s.Beharilal Ramcharan Cotton Mills Ltd., AIR 1961 SUPREME COURT 1295” the stipulation of time in the commercial contract is always the essence of the contract and therefore, as it became impossible for the petitioner to load the cargo in the month of February,2000 as agreed between the parties in the Contract because of taking place of force majeure events, the petitioner's liability to supply “cargo bb” under the contract ceased to exist as the contract was the mercantile contract. The learned counsel also relied on the judgment of the Supreme Court in the case of “Satyabrata Chose Vs.

Mugneeram Bangur and Co. and another, AIR 1954 Supreme Court 44". According to the learned Counsel the construction placed by the learned Arbitrator on clause 20 of the Contract between the parties is impossible construction. The clause 20 in terms mentions failure of the contract because of force majeure event. Therefore, according to the learned Counsel there is no breach committed by the petitioner of clause 20 of the contract. It is also submitted by the learned Counsel that so far as "cargo cc" is concerned, again there is clear stipulation in the contract that the schedule for shipment of the "cargo cc" is to be confirmed in February,2000. Admittedly that schedule has not been confirmed in the month of February,2000 and therefore, there was no obligation on the petitioner to supply "cargo cc". The learned Counsel for petitioner submits that though the contract mentions the "cargo cc" as the firm cargo, but everything about the "cargo cc" was undecided and that was to be decided at later stage. Though the contract mentions that to be a firm cargo, in law it cannot be a firm cargo.

4. So far as computation of damages is concerned, the learned Counsel submits that according to the respondent the breach of the contract occurred in the month of February,2000 and therefore, the price prevailing in the month of February,2000 should have been taken into consideration by the learned Arbitrator and not the price

prevailing at a later date. The learned Counsel submits that the learned Arbitrator had to take into consideration the offer made by the petitioner to supply the cargo at the same price which was agreed between the parties but on payment of increased fare. It is submitted that as the petitioner was willing to supply the goods at the same price which is mentioned in the contract, the learned Arbitrator is not justified in holding that the respondent was justified in making purchase of the same commodity from a third party at a much higher rate.

5. On behalf of the respondent on the other hand it is submitted that the Award impugned in the petition is well considered Award and the learned Arbitrator has given reasons in detail for the findings recorded by the learned Arbitrator. It is submitted that the entire case turns on interpretation to be placed on various terms in the contract. The learned Arbitrator has considered the terms of the contract and therefore, unless this Court comes to the conclusion that the construction placed by the learned Arbitrator on the terms of the contract are impossible, this Court cannot interfere with the Award. It is submitted that perusal of clause 20 of the Contract itself shows that the happening of Force Majeure event every time will not result in frustration of the contract. It may result in delay in supplying the cargo. It is submitted that the construction placed by the learned

Arbitrator on clause 20 of the contract is thus a possible construction. It is further submitted that so far as “cargo cc” is concerned, the petitioner himself was insisting of “cargo cc” being taken as firm cargo. So far as “cargo cc” is concerned the price of the cargo was mentioned and only schedule of loading the cargo was yet to be fixed and merely that does not make the cargo optional cargo. It is submitted that the petitioner itself had intimated that because of the occurring of force majeure event, the port from which the loading was to take place was not available and therefore, in such a situation the petitioner could not have fixed the schedule for loading of “cargo cc” in the month of February,2000. It is clear from the correspondence between the parties that immediately after the effect of the force Majeure event was over, a stand was taken by the petitioner that the contract was optional and he is not in a position to supply the cargo unless the respondent agrees to pay fare at a higher rate. It is therefore, submitted that in this situation the learned Arbitrator is justified in holding that there was breach of contract committed by the petitioner in relation to “cargo cc”. So far as award as regards computation of damages are concerned, the learned Counsel submits that the offers that were made by the petitioner were conditional offers and therefore, they could not have been accepted by the respondent. The learned Counsel submits that the conclusions that have been reached by the learned Arbitrator in relation to the damages are also a possible conclusions and

therefore, this Court cannot interfere with this Award in its limited jurisdiction under Section 34 of the Arbitration and Conciliation Act,1996.

6. Now in the light of these rival submission, if the record of the case is perused, it is clear that so far as “cargo bb” is concerned, everything turns on interpretation to be placed on clause 20 of the Contract. The clause 20 of the contract reads as under:-

> “20. Force Majeure:
>
> Seller shall not be liable to Buyer nor shall Buyer be liable to Seller for any delay, Interruption or failure in the performance of obligations hereunder (including delay or loss of or damage to any vessel after notification) if such delay, interruption or failure is due or result from war (whether declared or undeclared), blockade, revolution, riot, insurrection, military mobilization, civil commotion, strike, Act of Got, Public enemies, governmental restrictions or control on imports, exports or foreign exchange, fire, flood, storm, tempest, labour disputes, any

> Order from National port, local or transportation Authority, embargoes or any other causes beyond the control of or which cannot reasonably be avoided by, Seller or Buyer as the case may be.
>
> Both parties agree to endeavour to minimize the effect of Force Majeure conditions to whatever extent they can and mutually agree on alternative courses of action either in anticipation of or after the force majeure conditions after the normalcy is restored. The party whose performance is so prevented or delayed shall promptly give notice to the other party with supporting evidence and shall take reasonable steps to make good and resume its performance with least possible delay. “

Perusal of the above clause shows that on happening of the events which are mentioned in the first part of clause 20 of the Contract, the performance of the obligation cast on the parties do not get discharged in every case, though in a given situation it may so happen. Happening of some of the events which are mentioned in the first part

may result only in delay in performance of the obligation. So far as the present case is concerned, the port from where the cargo was to be loaded had declared an event of Force Majeure. It is clear from the letter dated 31.1.2000 addressed to respondent by the petitioner that even the petitioner perceived the effect of happening of force majeure event as not resulting in discharge of the obligation to supply "cargo bb". In the letter dated 31.1.2000 the petitioner stated that the Terminal Coal Matola (TCM) will advise shippers of how long the terminal will be inoperative for loading. This letter specifically referred to the second cargo i.e. Cargo bb. After receiving this communication the respondent addressed a letter dated 2.2.2000, that letter reads as under:-

> "In view of the Force Majeure, as informed by you, the present Laycan given by you for the 2nd shipment of 15-25 February,2000 may get delayed. We would request you to please inform us as and when Force Majeure conditions are removed and the fresh Laycan for our approval. You will appreciate that the change in the 2nd shipment schedule with you will require us to re-schedule some of the other shipments and the new Laycan has to be

given considering the new shipment schedule."

The respondent states that because the force majeure event occurred the loading of second cargo i.e. "cargo bb" would be delayed. The respondent requested the petitioner to keep them informed about the cessation of the Force Majeure conditions so that second shipment can be re-scheduled. It is pertinent to note here that under the contract between the parties there is provision for re-scheduling of the loading by the buyer. That provision is in clause "8" of the contract, which reads as under:

"8. Timing"

FIRM CARGO NO.	LOADING AT LOADPORT	DISCHARGE
aa)	DECEMBER,1999	L&T Jetty. Pipav
bb)	FEBRUARY,2000	Chennai
cc)	TO BE INDICATED AT A LATER DATE.	

Laycan to be narrowed 45 days in advance.

Schedule as above are indicative. Buyer shall reschedule / defer the shipments, if necessary, well in advance."

It is clear from the above said clause that the schedule fixed by the parties is to be adhered to, but it is not impossible to change the

schedule and the buyer has been given power to modify the schedule, if necessary and well in advance. The correspondent between the parties shows that when the force majeure event occurred the respondent wanted to know the further development so that the respondent could re-schedule the shipment of “cargo bb”. Generally when the time for performance is stipulated in the mercantile contract, it is to be taken as essence of the contract. But the parties are always free to alter the general contract. Whether time is essence of the contract is to be decided on the basis of terms and conditions of the contract. In my opinion, looking to the provisions of clause 8 and clause 20 of the contract in question, it can be said that though the time schedule fixed by the contract was generally to be adhered to by the parties, it was possible to modify that schedule in certain situations and therefore, merely because it was not possible for the petitioner to adhere to the schedule of loading of “cargo bb” because of force majeure event that occurred in this case, it cannot be said that it resulted in frustration of the contract. So far as the judgment of the Supreme Court in the case of “Satyabrata Ghose Vs. Mugneeram Bangur & Co, and another, AIR 1954 SC 44” is concerned, in my opinion though in a situation where it becomes impossible for a party to perform its obligation, under the contract for the reasons beyond its control, the contract gets discharged, there may be cases where the contract may survive. Whether in the present case happening of force

majeure event resulted in frustration or not is to be decided on the basis of facts and circumstances of this case. In my opinion, the learned Arbitrator has considered the facts and circumstances of this case in proper perspective and has come to the conclusion that in so far as “cargo bb” is concerned, the occurrence of force majeure event results only in suspension of the schedule and not frustration of the contract. In my opinion, the construction that has been placed by the learned Arbitrator on clause 20 of the contract is a possible construction and therefore, I will not be justified in setting aside the Award merely because I find that another construction also can be placed on the clauses of the contract.

7. So far as “cargo cc” is concerned, the learned Arbitrator has recorded the findings that it was a firm cargo and not an optional cargo. The learned Arbitrator has referred to the clauses in the contract which themselves describe the “cargo cc” as firm cargo. Perusal of the contract shows that so far as “cargo cc” is concerned, everything was decided only loading at loadport and discharge port and schedule of shipment was to be decided. The price was decided by the parties. It is pertinent to note here that so far as this cargo is concerned, it appears from the correspondence between the parties that the respondent tried to describe this cargo as an optional cargo. It is the petitioner who objected to cargo cc being described as an

optional cargo. By the agreement dated 18.9.1999 the petitioner and respondent have decided the price and quantity to be supplied of the "cargo cc" which itself indicates that it is a firm cargo instead of optional cargo. In my opinion, as the quantity of the cargo and the price of the cargo was fixed by the parties by the Contract merely because the loading date and the discharge port and the exact schedule of the shipment were not decided, the cargo cannot be termed as an optional cargo. Therefore, I do not see any reason to interfere with the findings recorded by the learned Arbitrator that the cargo cc is a firm cargo. According to the learned Advocate for the petitioner the schedule of shipment of cargo was to be confirmed by the respondent in the month of February,2000. It is clear from the correspondence between the parties that by letter dated 31.1.2000 the petitioner informed the respondent about the existence of force majeure event and that because of that the terminal was inoperative for loading work. Even, the petitioner did not state as to when that will become operative. In this situation therefore, in my opinion, the respondent could not have been forced to fix the loading schedule of "cargo cc" in the month of February,2000. In my opinion, because of happening of force majeure event even the obligation of the respondent to fix the loading schedule of cargo cc in the month of February,2000 will get suspended, and therefore, in my opinion, the findings that have been recorded by the learned Arbitrator in relation

to “cargo cc” is a possible conclusion reached by the learned Arbitrator, and therefore, I do not see any reason to interfere with the same.

8. So far as the aspect of computation of damages, the only submission advanced is that the learned Arbitrator has not taken into consideration the offers made by the petitioner for supply of material at the same price. Perusal of the correspondence between the parties shows that those offers were made by the petitioner on the footing that the contract is frustrated and he was making offer only to maintain good relation with the respondent. Had the respondent accepted that offer it would have resulted in his accepting the stand of the petitioner that the contract is frustrated. In my opinion, the risk purchase clause in the contract has been properly construed by the learned Arbitrator. By no stretch of imagination it can be said that the contract entered into by the respondent with third party for purchase of cargo showing the price at which the purchase was made was a fabricated contract. The respondent is a regular purchaser of coal in large quantity and therefore, it cannot be said that the purchases were made by the respondent deliberately at a higher price to recover the same from the petitioner. The formula adopted by the learned Arbitrator for computing the amount of damages in my opinion is the only possible formula.

9. To sum up the Award which is impugned in the petition is well considered and a detail Award which cannot be interfered with by this Court in its limited jurisdiction under Section 34 of the Arbitration and Conciliation Act. The entire case turns on construction to be placed on various terms of the contract. The learned Arbitrator has considered the terms of the contract in the light of oral and documentary evidence on record , I find that the construction placed by the learned Arbitrator on various clauses of the contract and the findings recorded by the learned Arbitrator are possible though it is possible to say that on the basis of the same material on record, it is possible to reach a different conclusion. But merely because a different conclusion is possible, this Court cannot interfere with the Award which is based on the conclusions which are possible. In this view of the matter therefore, considering the extremely limited jurisdiction of this Court under section 34 of the Act, in my opinion the Award cannot be interfered with.

10 In the result therefore, the petition fails and is dismissed. The petitioner is directed to pay cost of this petition to the respondent as incurred by the respondent.